TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 142.

THE JAMESTOWN AND NORTHERN RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THEODORE J. JONES.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA.

FILED SEPTEMBER 28, 1899.

(17,005.)

SU

THE

IN E

Writ of
Order al
Citation
Clerk's
Transcri
Sum
Com
Bon
Res
She
Am
Ans
Rep
Not
Not
Stip
Dep

(17,005.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 142.

HE JAMESTOWN AND NORTHERN RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THEODORE J. JONES.

N ERROR TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA.

INDEX.

	Original.	Print.
it of error	*a*	1
er allowing writ of error	*b*	2
ation and service	*c*	2
rk's certificate and return	*d*	3
nscript from district court of Stutsman county	1	3
Summons	1	3
Complaint	2	4
Bond for injunction	6	7
Restraining order	8	8
Sheriff's return of service	9	8
Amended complaint	10	9
Answer	14	11
Reply	18	14
Notice of trial	20	15
Note of issue	21	16
Stipulation to take deposition of A. E. Sunderhauff	22	16
Deposition of A. E. Sunderhauff	23	17

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 17, 1899.

	riginal.	Print.
Order for judgment	30	21
Findings of fact	30	22
Conclusions of law	37	26
Judgment	39	27
Bill of costs	41	28
Notice of appeal	43	30
Bond on appeal	44	30
Judge's certificate	46	31
Clerk's certificate	46	32
Hearing and submission	47	32
Judgment	47	33
Opinion	48	33
Petition for rehearing	56	38
Order denying petition for rehearing	57	39
Opinion on application for rehearing	58	40
Final judgment	61	41
Petition for writ of error	62	42
Assignment of errors	63	43
Bond on writ of error	67	46

a In Supreme Court, State of North Dakota.

THE JAMESTOWN & NORTHERN RAILROAD COMPANY, Plaintiff,
vs.
THEODORE J. JONES, Defendant.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the supreme court of the State of North Dakota, Greetings:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of North Dakota, before you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Jamestown & Northern Railroad Company and Theodore J. Jones, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Jamestown & Northern Railroad Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to
b the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the said Supreme Court, the 5th day of August, in the year of our Lord eighteen hundred and ninety-eight.

[Seal Circuit Court of the United States, District of North Dakota.]

J. A. MONTGOMERY,
Clerk of the United States Circuit Court for the District of North Dakota.

Upon the petition of the plaintiff, The Jamestown & Northern Railroad Company, by its attorneys, duly made and filed herein, the foregoing writ of error is hereby approved and allowed. It is further ordered that the said Jamestown & Northern Railroad Company shall give a bond in the sum of $750, which, upon its approval, shall operate as a supersedeas bond herein.

Done at the capitol, in the city of Bismarck, in the State of North Dakota, this 30 day of July, 1898.

GUY C. H. CORLISS,
Chief Justice of the Supreme Court of North Dakota.

[Endorsed:] 575. Filed in the clerk's office, supreme court, State of North Dakota, Aug. 18, 1898. R. D. Hoskins, clerk.

c In the Supreme Court of the United States, October Term, 1898.

THE JAMESTOWN & NORTHERN RAILROAD COMPANY, Plaintiff in Error,
vs.
THEODORE J. JONES, Defendant in Error.

To Theodore J. Jones, above defendant in error, and S. E. Ellsworth, his attorney:

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States, to be holden at the city of Washington, on the second Monday of October, A. D. 1898, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of North Dakota, wherein The Jamestown & Northern Railroad Company *of* plaintiff in error and you, the said Theodore J. Jones, is the defendant in error, to show cause, if any there be, why judgment rendered against said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to all the parties in that behalf.

Seal Supreme Court, State of North Dakota.

Witness the Honorable Guy C. H. Corliss, chief justice of the supreme court of the State of North Dakota, this 8th day of August, A. D. 1898.

R. D. HOSKINS,
Clerk of the Supreme Court of the State of North Dakota.

Due and personal service of the above citation, by copy thereof, admitted at Jamestown, North Dakota, this 12th day of August, 1898.

S. E. ELLSWORTH,
Attorney for said Defendant in Error, Theodore J. Jones.

[Endorsed:] 575. Filed in the clerk's office, supreme court, State of North Dakota, Aug. 13, 1898. R. D. Hoskins, clerk.

d STATE OF NORTH DAKOTA, *ss:*

In the Supreme Court.

I, R. D. Hoskins, clerk of the supreme court of the State of North Dakota, do hereby certify and return that the following papers, being pages numbered from 1 to 69, *is* a full, true, correct, and complete transcript and copy of the original judgment-roll in the case of Jamestown & Northern Railroad Co. *vs.* Theodore J. Jones, as the same was transmitted to this court and filed in this office; also a full, true, correct, and complete transcript and copy of all papers and proceedings had thereunder in the said supreme court of North Dakota, and the same are transmitted to the Supreme Court of the United States in pursuance to the foregoing writ of error and citation.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Bismarck, the capital of said State of North Dakota, this 10th day of September, A. D. 1898.

[Seal Supreme Court, State of North Dakota.]

R. D. HOSKINS,
Clerk of the Supreme Court of North Dakota.

1 STATE OF NORTH DAKOTA, *ss:*

In the Supreme Court.

I, R. D. Hoskins, clerk of the supreme court of the State of North Dakota, is pursuance to the foregoing writ of error, issued out of the clerk's office of the circuit court for the district of North Dakota, do hereby make return to the said the Supreme Court of the United States as follows:

On the 4th day of April, 1898, there was filed in the said office of the clerk of the supreme court of North Dakota a judgment-roll on appeal from the district court of the county of Stutsman, in said State of North Dakota; which judgment-roll is in the following words and figures, to wit:

STATE OF NORTH DAKOTA, }
County of Stutsman. }

In District Court, Fifth Judicial District.

JAMESTOWN & NORTHERN RAILROAD COMPANY, a Corporation, }
Plaintiff, }
vs. }
THEODORE J. JONES, Defendant. }

Summons.

State of North Dakota to the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of the answer upon the subscribers within thirty

days after the service of this summons upon you, exclusive of the day of such service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated this 24th day of December, 1896.

BALL, WATSON & MACLAY,
Attorneys for Plaintiff, Fargo, North Dakota.

Filed in the office of clerk district court for Stutsman county, N. Dakota, Dec. 26, 1896, at 10 o'clock a. m.

J. H. SEVERN, *Clerk.*

2 STATE OF NORTH DAKOTA, }
County of Stutsman. }

In District Court, Fifth Judicial District.

JAMESTOWN & NORTHERN RAILROAD COMPANY, a Corporation, Plaintiff,
vs.
THEODORE J. JONES, Defendant.

Complaint.

Plaintiff complains of the defendant and alleges:

I.

That said plaintiff is now, and was during all the times hereinafter mentioned, a corporation created, organized, and existing under and by virtue of the laws of the Territory of Dakota, now State of North Dakota, and that prior to March 3rd, 1883, said corporation duly filed with the Secretary of the Interior of the United States a copy of its articles of incorporation and due proofs of its organization under the same.

II.

That during all said times the plaintiff corporation has operated and managed a line of railroad running from Jamestown, in said county and State, through said county of Stutsman in a northwesterly direction and across the northeast quarter of section eight (8), in township one hundred forty-one (141), of range sixty-four (64), in said county of Stutsman; that said quarter section is about twelve miles from Jamestown and is within the first twenty-mile section of the said railroad.

III.

That within twelve months after the location of said first section of twenty miles of its said road and within twelve months after the location of said road over the above-mentioned quarter section of land the said Jamestown & Northern Railroad Company duly
3 filed with the register of the United States land office for the district where said land was located, to wit, at the local land

office, at Fargo, North Dakota, a map and profile of its road; that said map and profile were duly approved by the Secretary of the Interior on March 13th, 1893, and the said profile was thereupon noted upon the plats in said land office, and that said lands in said district, including the quarter section above mentioned, were during all said times public surveyed lands of the United States, and that said twenty-mile section of said railroad above mentioned was completed within five years after the location thereof.

IV.

That by virtue of the premises and under the provisions of the act of Congress of March 3rd, 1875, entitled "An act granting to railroads the right of way through the public lands of the United States," the said Jamestown Railroad Company became and was and is now the owner of and entitled to the undisturbed right of way over, through, and across said quarter section above described, and to the sole and undisturbed possession and use of a strip of land two hundred feet wide over and across said quarter section, being one hundred feet on each side of the central line of its said road, as the same was at said time and is now located and constructed.

V.

That the above-named defendant claims an estate or interest in said right of way and in said strip of land, being the strip across said premises and extending one hundred feet on each side of the central line of said railroad adverse to the plaintiff, and said defendant has heretofore repeatedly interfered with the plaintiff in its use and possession of said strip of land and right of way, and has repeatedly obstructed and hindered the plaintiff in the operation and management of said line of railroad, and now threatens to further interfere with plaintiff's use and possession of said strip of land and right of way and to obstruct and hinder it in the
4 operation of said road; and unless the defendant is prevented and restrained from so doing by the order of this court, plaintiff is informed and believes that the defendant will interfere with plaintiff's use and possession of said strip of land and right of way, and will obstruct and hinder plaintiff in the operation of said road.

Wherefore the plaintiff prays that it may be adjudged, determined, and decreed by this court:

1st. That the plaintiff is the owner of the right of way across said quarter section of land to the extent of one hundred feet on each side of the central line of its said road as now constructed over and upon the same, and that the right, title, or interest of the defendant in said quarter section, if any he has, is subject and inferior to plaintiff's said right of way.

2nd. That a temporary injunction order should issue, pending this action, restraining and enjoining the defendant from interfering with plaintiff's use and possession of said strip of land and right of way, or from obstructing or hindering plaintiff in its manage-

ment and operation of said line of railroad over and across said quarter section or otherwise.

3rd. That said restraining order should by decree of this court be made permanent, and for such other and further relief as to the court may seem meet.

BALL, WATSON & MACLAY,
Plaintiff's Attorneys, Fargo, North Dakota.

STATE OF NORTH DAKOTA, } ss:
County of Cass, }

D. G. Maclay, being duly sworn, says he is a member of the firm of Ball, Watson & Maclay, who are attorneys for the plaintiff in the above-entitled cause, and that the foregoing complaint is true to affiant's best knowledge, information, and belief.

D. G. MACLAY.

Subscribed and sworn to before me this 24th day of December, 1896.

ORIN W. FRANCIS,
[SEAL.] *Notary Public, Cass County, North Dakota.*

5 STATE OF NORTH DAKOTA, }
County of Stutsman. }

In District Court, Fifth Judicial District.

JAMESTOWN & NORTHERN RAILROAD COMPANY, a Corporation, Plaintiff,
vs.
THEODORE J. JONES, Defendant.

STATE OF NORTH DAKOTA, } ss:
County of Cass, }

D. G. Maclay, being duly sworn, deposes and says that he is one of the attorneys for and agent of the plaintiff in the above-entitled action; that the plaintiff has fully and fairly informed affiant of all the facts in the case, and after such statement and information affiant verily believes that the plaintiff has a cause of action against the above-named defendant, and that all the facts involved in said action are set forth at length in the complaint herein, which complaint is hereto attached and hereby made a part of this affidavit, with the same force and effect as if all the allegations thereof were incorporated herein at length, and that said complaint is true to affiant's best knowledge, information, and belief.

D. G. MACLAY.

Subscribed and sworn to before me this 24th day of December, 1896.

ORIN W. FRANCIS,
[SEAL.] *Notary Public, Cass County, North Dak.*

Filed in the office of clerk district court for Stutsman county, N. Dakota, Dec. 26, 1896, at 10 o'clock a. m.

J. H. SEVERN, *Clerk.*

6 STATE OF NORTH DAKOTA, }
County of Stutsman. }

In District Court, Fifth Judicial District.

JAMESTOWN & NORTHERN RAILROAD COMPANY, a Corporation, Plaintiff,
vs.
THEODORE J. JONES, Defendant.

Whereas the above-named plaintiff has commenced or is about to commence an action in the district court of the fifth judicial district in and for the county of Stutsman against the above-named defendant and is about to apply for an injunction in said action against the said defendant, as in the files in said action more particularly set forth and described:

Now, therefore, we, the undersigned, residents and freeholders of the State of North Dakota, in consideration of the premises and of the issuing of said injunction, do jointly and severally undertake in the sum of five hundred dollars ($500.00) and promise to the effect that in case said injunction shall issue the said plaintiff will pay to said defendant such damages, not exceeding the sum of $500.00, as said defendant may sustain by reason of the said injunction if the court shall finally decide that the plaintiff was not entitled thereto.

Given under our hands and seals this 24th day of December, 1896.

ALEX. STERN.
MAURICE KAUFMAN.

STATE OF NORTH DAKOTA, }
County of Cass, } *ss:*

On this 24th day of December, 1896, before me, a notary public in and for said county and State, personally appeared Alex. Stern and Maurice Kaufman, known to me to be the same persons who are described in and who executed the foregoing undertaking,
7 and acknowledge to me that they executed the same for the purposes and uses therein expressed.

D. G. MACLAY,
[SEAL.] *Notary Public, Cass County, North Dak.*

The foregoing bond is hereby approved.

RODERICK ROSE, *Judge.*

Filed in the office of clerk district court for Stutsman county, N. Dakota, Dec. 26, 1896, at 10 o'clock a. m.

J. H. SEVERN, *Clerk.*

8 STATE OF NORTH DAKOTA, }
County of Stutsman. }

In District Court, Fifth Judicial District.

JAMESTOWN & NORTHERN RAILROAD COMPANY, a Corporation, Plaintiff,
vs.
THEODORE J. JONES, Defendant.

Order.

On the complaint of the plaintiff, duly verified, and upon the affidavit of D. G. Maclay, agent for and one of the attorneys for the plaintiff, copies of all of which are attached hereto, it is by the court:

Ordered that the above-named defendant and his agents and servants be, and they are hereby, pending this action, restrained and enjoined from interfering with plaintiff's use and possession of the strip of land and right of way, mentioned and described in the said complaint, over and across the northeast quarter of section eight (8), in township one hundred and forty-one (141), of range sixty-four (64), in said county of Stutsman, and from obstructing or hindering the plaintiff in its management and operation of its line of railroad over and across said quarter section or otherwise, under pains and penalties of the law in that behalf provided.

Dated December 26th, 1896.

RODERICK ROSE, *Judge.*

Attest: J. H. SEVERN, *Clerk.*
[SEAL.]

Filed in the office of clerk district court for Stutsman county, N. Dakota, Dec. 26, 1896, at 10 o'clock a. m.

J. H. SEVERN, *Clerk.*

9 STATE OF NORTH DAKOTA, }
County of Stutsman, } *ss:*

District Court, Fifth Judicial District.

JAMESTOWN & NORTHERN RAILROAD COMPANY, a Corporation, Plaintiff,
vs.
THEODORE J. JONES, Defendant.

STATE OF NORTH DAKOTA, }
County of Stutsman, } *ss:*

I, J. J. Eddy, sheriff of said county, hereby certify and return that on the 26th day of December, 1896, within the said county of Stutsman, I served the summons, complaint, order, and undertaking in the above-entitled action, which are hereto attached, on Theodore J. Jones, defendant in said action, by delivering a copy of said sum-

mons, complaint, order, and undertaking to Theodore J. Jones, said defendant, personally.

J. J. EDDY,
Sheriff of Stutsman County, N. D.

Sheriff's Fees.

Service	$ .60
4 copies	1.00
Mileage, 24 miles	2.40
Total	$4.00

10 STATE OF NORTH DAKOTA, }
County of Stutsman. }

In District Court, Fifth Judicial District.

JAMESTOWN & NORTHERN RAILROAD COMPANY, a Corporation, Plaintiff,
vs.
THEODORE J. JONES, Defendant.

Amended Complaint.

The plaintiff, by leave of the court first had and obtained, files this its amended complaint in the above-entitled action and alleges:

I.

That said plaintiff is now and was during all the times herein after mentioned a corporation created, organized, and existing under and by virtue of the laws of the Territory of Dakota, now State of North Dakota, and that prior to March 3rd, 1883, said corporation duly filed with the Secretary of the Interior of the United States a copy of its articles of incorporation and due proofs of the organization under the same.

II.

That during all said times the plaintiff has owned and been possessed of a line of railroad running from Jamestown, in said county and State, through said county of Stutsman in a northwesterly direction and across the northeast quarter of section eight (8), in township one hundred and forty-one (141), of range sixty-four (64), in said county of Stutsman; that said quarter section is about twelve miles from Jamestown and is within the first twenty-mile section of the said railroad; that all the stock and bonds issued by said plaintiff corporation are now and have been for six months last passed owned and controlled by the Northern Pacific Railway Company, a foreign corporation, and that as the owner of such stock and bonds said Northern Pacific Railway Company, by and with the consent and permission of the plaintiff corporation, has dur-
11 ing said six months operated and is now operating and managing said line of railroad.

III.

That within twelve months after the location of said first section of twenty miles of its said road and within twelve months after the location of said road over the above-mentioned quarter section of land the said Jamestown & Northern Railroad Company duly filed with the register of the United States land office for the district where said land was located, to wit, at the local land office at Fargo, North Dakota, a map and profile of its road; that said map and profile were duly approved by the Secretary of the Interior on March 13th, 1883, and the said profile was thereupon noted upon the plats in said land office, and that said lands in said district, including the quarter section above mentioned, were during all said times public surveyed lands of the United States, and that said twenty-mile section of said railroad above mentioned was completed within five years after the location thereof.

IV.

That by virtue of the premises and under the provisions of the act of Congress of March 3rd, 1875, entitled "An act granting to railroads the right of way through the public lands of the United States," the said Jamestown & Northern Railroad Company became and was and is now the owner of and entitled to the undisturbed right of way over, through, and across said quarter section above described and to the sole and undisturbed possession and use of a strip of land two hundred feet wide over and across said quarter section, being one hundred feet on each side of the central line of its said road as the same was at said time and is now located and constructed.

V.

That the above named defendant claims an estate or interest in said right of way and in said strip of land, being the strip across said premises and extending one hundred feet on each side of the central line of said railroad, adverse to the plaintiff, and said
12 defendant has hitherto repeatedly interfered with the plaintiff and said Northern Pacific Railroad Company in their use and possession of said strip of land and right of way, and has repeatedly obstructed and hindered them in the operation and management of said line of railroad and now threatens to further interfere with their use and possession of said strip of land and right of way and to obstruct and hinder them in the operation of said road, and, unless the defendant is prevented and restrained from so doing by the order of this court, plaintiff is informed and believes that the defendant will interfere with such use and possession of said strip of land and right of way and will obstruct and hinder the operation of said road.

Wherefore the plaintiff prays that it may be adjudged, determined, and decreed by this court:

1st. That the plaintiff is the owner of the right of way across said quarter section of land to the extent of one hundred feet on each

side of the central line of its said road as now constructed over and upon the same, and that the right, title, or interest of the defendant in said quarter section, if any he has, is subject and inferior to plaintiff's said right of way.

2nd. That a temporary injunction order should issue, pending this action, restraining and enjoining the defendant from interfering with plaintiff's use and possession of said strip of land and right of way, or from obstructing or hindering plaintiff and said Northern Pacific Railway Company in the management and operation of said line of railroad over and across said quarter section or otherwise.

3rd. That said restraining order should by decree of this court be made permanent, and for such other and further relief as to the court may seem meet.

BALL, WATSON & MACLAY,
Plaintiff's Attorneys, Fargo, North Dakota.

13 STATE OF NORTH DAKOTA, } ss:
County of Cass, }

D. G. Maclay, being duly sworn, says he is a member of the firm of Ball, Watson & Maclay, who are attorneys for the plaintiff in the above-entitled cause, and that the foregoing complaint is true to affiant's best knowledge, information, and belief.

D. G. MACLAY.

Subscribed and sworn to before me this 18th day of February, 1897.

DANIEL B. HOLT,
[SEAL.] *Notary Public, Cass County, North Dakota.*

(Endorsement:) Service of the within-amended complaint hereby admitted this 23rd day of February, 1897, at Jamestown, N. D. S. E. Ellsworth, attorney for def't. Filed in clerk's office, Stutsman county, North Dakota, July 28, 1897, at 9 o'clock a. m. H. G. Proctor, clerk.

14 STATE OF NORTH DAKOTA, } ss:
County of Stutsman, }

In District Court, Fifth Judicial District.

JAMESTOWN & NORTHERN RAILROAD COMPANY, a Corporation, Plaintiff,
vs.
THEODORE J. JONES, Defendant.

Answer.

The defendant herein for answer to plaintiff's complaint alleges:

I.

He denies the allegation contained in paragraph I of plaintiff's complaint.

II.

He denies that said plaintiff corporation has at any time since March 3rd, 1883, operated or managed a line of railroad as described in paragraph II of said complaint. He admits that the N. E. ¼ of section 8, township 141, range 64, is about 12 miles from Jamestown, North Dakota.

III.

He specifically denies that on March 13th, 1883, or for more than one year prior to that time, the N. E. ¼ of section 8, township 141, range 64, was public lands of the United States.

IV.

He denies that the said plaintiff became on March 13th, 1883, or at any time, or was or is now the owner of a right of way over said N. E. ¼ of said section to the width of 200 feet, or that plaintiff has at any time acquired any estate or interest or right of way whatever in said quarter section or any part thereof.

V.

Defendant admits that he claims an estate or interest in said quarter section, and alleges that he is the owner in fee thereof and entitled to its full use and possession. He alleges that he has not obstructed or hindered plaintiff in the operation and management of its line of railroad or done or threatened to do any act upon a strip of land one hundred feet wide on each side of the central line of said railroad other than was necessary to his proper and lawful use and enjoyment of the same.

VI.

Further answering, defendant denies generally and specifically each and every allegation in said complaint contained, except such as are hereinbefore qualified or admitted.

VII.

For a counter-claim to plaintiff's cause of action defendant alleges:

That at all the times hereinafter mentioned plaintiff was the owner in fee and entitled to the full use and possession of the northeast quarter (N. E. ¼) of section eight (8), in township 141, and range 64, in Stutsman county, North Dakota.

That while defendant was the owner and so seized and possessed of said premises the plaintiff herein, on or about the 1st day of March, A. D. 1883, without right or title and without leave, license, or authority, did go upon said premises and take possession of a strip of land of the width of one hundred feet running diagonally through said premises, and being that certain strip of land 50 feet on each side of the central line of plaintiff's railroad track now used by plaintiff as its right of way.

VIII.

That defendant caused to be laid out and constructed on said premises a railroad track and caused a grade or embankment to be thrown up along the same and ditches to be dug, to the great damage of this defendant; that plaintiff has ever since the wrongful taking of said premises, on or about March 1st, 1883, to the present time, and does now use the said premises for a railroad track, and that trains of cars drawn by engines
16 using steam power pass over and across the same daily; that plaintiff has at all times since said unlawful and wrongful taking ousted defendant and excluded him from the use and possession of said strip of land, and has exercised all the rights and powers of ownership over the same.

IX.

That by the said wrongful taking and use of said strip of land as a railroad track defendant has been greatly damaged in this, that the said quarter section is cut into three-cornered tracts and made of greatly impaired convenience and decreased value for farming or for any purposes; that defendant is deprived of the use and possession of about eight acres of his land; that the crops on defendant's land are injured by smoke and dust from said railroad, and his crops and buildings are subjected to great hazard of destruction from fire; that by said wrongful taking and use of said premises by plaintiff for a railroad track defendant has sustained damage in the sum of five hundred dollars.

X.

That the plaintiff has never at any time instituted proceedings or resorted to any legal process whatever to condemn said land or to divest defendant of the title, ownership, or use thereof save the forcible and wrongful taking thereof, as hereinbefore stated; that defendant has never at any time consented to such taking by plaintiff or by any corporation or person, and has never received any compensation whatever from plaintiff or from any one for his said land or for said injuries thereto inflicted by plaintiff.

Wherefore prays judgment:

(1.) That plaintiff's complaint be dismissed and the injunction herein granted be dissolved.

(2.) That he have judgment against plaintiff for the sum of five hundred dollars and his costs.

S. E. ELLSWORTH,
Attorney for Defendant.

17 STATE OF NORTH DAKOTA, } ss:
County of Stutsman, }

Theodore J. Jones, being first duly sworn, deposes and says that he is the defendant in the above-entitled action, and that he has

read the foregoing answer and understands the contents thereof, and that the same is true to his own knowledge.

THEODORE J. JONES.

Sworn to and subscribed before me this 27th day of January, 1897.

JAMES A. MURPHY,
[SEAL.] *Notary Public, Stutsman County, N. D.*

(Endorsements:) Service of within answer is hereby admitted this 29th day of January, A. D. 1897, at Fargo, N. D. Ball, Watson & Maclay, attorneys for plaintiff. Filed in clerk's office, Stutsman county, North Dakota, June 22, 1897, at 3.30 o'clock p. m. H. G. Procter, clerk.

18 STATE OF NORTH DAKOTA, }
County of Stutsman. }

In District Court, Fifth Judicial District.

JAMESTOWN & NORTHERN RAILROAD COMPANY, Plaintiff, }
vs. }
THEODORE J. JONES, Defendant. }

Reply.

The plaintiff herein, for reply to the defendant's answer and to the counter-claim therein set forth and contained, alleges:

1st. That it has no knowledge or information sufficient to form a belief as to whether the defendant is the owner in fee of any part of the land and premises described in the complaint, and denies that said defendant is now or ever was entitled to the full use and possession of the same. Plaintiff admits that it has taken possession of the strip of land running through said premises, as described in the complaint, but denies that said taking was without leave, license, or authority, or without right or title, and in that behalf reiterates and realleges the matters and things set forth and contained in the complaint herein regarding plaintiff's right and title in the premises.

2nd. Plaintiff admits that it caused a railroad track to be laid out and constructed on said premises, and that ever since the construction of said track to the present time trains of cars, drawn by engines using steam power, pass over and across the same daily. Plaintiff admits that it has at all times since the construction of said track claimed the exclusive right to the use and possession of said strip of land, and has exercised all the rights and powers of ownership over the same.

3rd. Plaintiff denies that defendant has been injured or sustained damage in the sum of $500, or in any other sum or amount
19 whatever, by the taking and using of said strip of land, or by smoke and dust from said railroad.

4th. Plaintiff denies each and every allegation in said reply contained except such as hereinbefore qualified or admitted.

BALL, WATSON & MACLAY,
Attorneys for Plaintiff.

STATE OF NORTH DAKOTA, }
County of Cass. }

D. G. Maclay, being first duly sworn, deposes and says that he is a member of the firm of Ball, Watson & Maclay, attorneys for the plaintiff in the above-entitled action; that the foregoing reply is true to affiant's best knowledge, information, and belief.

D. G. MACLAY.

Subscribed and sworn to before me this 2nd day of March, 1897.

JNO. S. WATSON,
[SEAL.] *Notary Public, Cass County, North Dakota.*

(Endorsements:) Service of the within reply is hereby admitted this 5th day of March, 1897, at Jamestown, N. D. S. E. Ellsworth, attorney for defendant. Filed in clerk's office, Stutsman county, North Dakota, July 28, 1897, at 9 o'clock a. m. H. G. Procter, clerk.

20 STATE OF NORTH DAKOTA, } *ss:*
County of Stutsman, }

In District Court, Fifth Judicial District.

JAMESTOWN & NORTHERN RAILROAD COMPANY, a Corporation, Plaintiff,
vs.
THEODORE J. JONES, Defendant.

Notice of Trial.

Please to take notice that the above-entitled action will be brought to trial at a regular term of the district court appointed to be held in and for the county of Stutsman, at the court-house, in the city of Jamestown, in the State of North Dakota, on the 6th day of July, A. D. 1897, at 2 o'clock in the afternoon of that day.

Dated the 18th day of June, 1897.

S. E. ELLSWORTH,
Attorney for Defendant.

To Ball, Watson & Maclay, attorneys for plaintiff.

(Endorsements:) Service of the within notice is hereby admitted this 19th day of June, 1897, at Fargo, North Dakota. Ball, Watson & Maclay, attorneys for plaintiff. Filed in clerk's office, Stutsman county, North Dakota, June 22, 1897, at 3.30 o'clock p. m. H. G. Procter, clerk.

21 District Court, 5th Judicial District, County of Stutsman.

THE JAMESTOWN & NORTHERN R. R. Co., Plaintiff,
against
THEODORE J. JONES, Defendant.

Note of Issue.

Issue of fact.
Last pleading served March 6th, 1897.
Ball, Watson & Maclay, plaintiff's attorneys.
S. E. Ellsworth, defendant's attorney.

Will the clerk please file this note of issue and enter upon the *cla*endar for the July, A. D. 1897, term of this court.

Yours, etc.,

S. E. ELLSWORTH.
Attorney for Defendant.

(Endorsement:) Filed in clerk's office, Stutsman county, North Dakota, June 22, 1897, at 3.30 o'clock p. m. H. G. Procter, clerk.

22 STATE OF NORTH DAKOTA, } ss:
County of Cass,

In District Court, Fifth Judicial District.

JAMESTOWN & NORTHERN RAILROAD COMPANY, Plaintiff,
vs.
THEODORE J. JONES, Defendant.

It is hereby stipulated and agreed by and between the parties to the above-entitled action that the deposition of A. E. Sunderhauff, register of the United States land office at Fargo, N. D., as a witness for the defendant, may be taken by and before L. A. Rose, Esq., a notary public in and for the county of Cass, in said State, at the hour of three o'clock of this day, and continue thence until done in the same manner and with like effect as if due and proper notice of the taking of such deposition had been regularly given herein. The intention of this stipulation is to waive the giving of any notice of the taking of such deposition; and this stipulation may be full authority to said notary to take the same.

Dated Fargo, N. D., July 20th, 1897.

BALL, WATSON & MACLAY,
Attorneys for Plaintiff.
S. E. ELLSWORTH AND
ORMSBY McHARG,
Attorneys for the Defendant.

23 STATE OF NORTH DAKOTA, } ss:
County of Stutsman, }

In District Court, Fifth Judicial District.

JAMESTOWN & NORTHERN RAILROAD COMPANY, Plaintiff, }
vs.
THEODORE J. JONES, Defendant. }

Deposition.

STATE OF NORTH DAKOTA, } ss:
County of Cass, }

A. E. SUNDERHAUFF, being first duly sworn, deposes and says:

I am over thirty years of age. I reside at the city of Fargo, county of Cass and State of North Dakota. I am the United States land register for the Fargo district of said State.

I am the legal custodian of the plat books and tract books of the United States land office and have held said office since April 1st, 1894.

My predecessor in said office was Waldo M. Potter, who is now dead. Upon my accession to said office all the records of said office then in existence were turned over to me, and I have the same in my custody at the present time.

By Attorney MCHARG:

Q. As such custodian and register of the land office has your attention been called to the various entries and notations affecting the status of the northeast quarter of section eight, township one hundred forty-one, range sixty four west, of the fifth principal meridian, in Stutsman county, North Dakota, touching the same since its survey by the United States Government?

Here Mr. Ball, attorney for the plaintiff, interposed the following objection: "At this time the plaintiff objects to the giving of any evidence by the witness Sunderhauff touching any matter not within his personal knowledge upon the ground that the same is incompetent, not being the best evidence, and said plaintiff
24 at the same time specially objects to the giving of any evidence by said witness, Sunderhauff, touching matters contained in or supposed to be contained in any record of his office not produced, or which record, if produced, is a copy instead of an original document, and also specially objects to the giving of any evidence of said witness, Sunderhauff, touching the contents or supposed contents or touching matter shown or supposed to be shown by any records of the United States land office at Fargo, N. D., which have heretofore been destroyed by fire, all upon the ground that the same and all thereof is incompetent, not the best evidence, and irrelevant and immaterial."

For the purpose of saving time and rep-ition of objections of questions it is hereby agreed by both parties that all testimony hereinafter given by said witness shall be taken subject to the foregoing in the same manner as if specific objections were made to each question and answer.

Ans. It has.

I have the plat book and the tract book aforesaid here with me. From said plat book it appears that township one hundred forty-one, sixty-four, aforesaid was surveyed on January 5th, 1876, and recorded and filed February 21st, 1876, at the Fargo land office.

I have also with me Tract Book Number 15, containing on page 27 thereof all the entries and notations affecting the northeast quarter of section 8, township 141, range 64, aforesaid; and it appears therefrom that Sherman Jones filed a declaratory statement under the pre-emptory law No. 7465 on February 12th, 1881, alleging settlement February 8th, 1881; that William S. King filed a declaratory statement under the pre-emptory law No. 1252 for said tract on May 26th, 1882; that Theodore J. Jones filed a declaratory pre-emptory statement No. 13898 for said tract on June 5th, 1883, alleging settlement March 3rd, 1883; that Ella Sharp made homestead entry No. 12223 March 7th, 1883, for the tract, which entry was
25 cancelled by relinquishment at the local office on November 21st, 1892, on which date Theodore J. Jones made homestead entry No. 20234 for the tract aforesaid, receiving his final certificate, No. 7233, February 18th, 1893.

In addition to the above entries and notations I find the following marked against the tract in said tract book: "See C, October 10th, 1884; also see letter C, January 9th, 1884; also see October 14, 1884." Touching these last-referred-to entries or notations, the capital initial letters refer to the division of the General Land Office from which said letters emanated, and the letters themselves were letters written from the General Land Office to the local land office at Fargo, N. D., under their respective dates. At the present time the initial "C" upon a letter from the General Land Office would indicate that such letter came from the division which deals with imperfect entries and furnishes or calls for information concerning the same. Although, as the scope of these divisions is very broad and they sometimes change, I cannot say what the particular signification of the letter "C" is in the notations above referred to.

The condition of this tract March 13th, 1883, as appears from the tract book aforesaid, is that it was then covered by the homestead entry No. 12223 of Ella Sharp, above referred to. From that time to the present time it has been covered by homestead entries, viz., the entry of Ella Sharp up to November 21st, 1892, and the entry of Theodore J. Jones, above referred to, from the last date to the present time, as appears from said tract book. Said Jones made final proof and received his final certificate as heretofore stated.

Said Tract Book No. 15 is a copy of the original tract book which was destroyed by fire in Fargo, N. D., June 7th, 1893, which said copy was furnished by the General Land Office of the United States

and made up from the records therein kept, and is the only evi-
dence of such entries in the Fargo land office, with the ex-
26 ception of the original homestead entry book, which was not
destroyed by fire, and which contains the homestead entries above referred to, which were made prior to said fire, viz., homestead entry No. 12223, dated March 7th, 1883, of Ella Sharp, and homestead entry No. 20234, dated November 21st, 1892, of Theodore J. Jones.

I have no record in said land office of the map of profile of the Jamestown & Northern railroad, and I do not know when said map was made. I do not know when the first 20-mile section of said railroad was located and have no record in said office of the same. I do not know how long after the location of the first 20-mile section of the said railroad the profile of the same was filed, if ever; nor do I know that the said map was filed within one year after said location.

Witness refers to the plat book aforesaid and is asked to state. The above question is abandoned.

I have no profile map of the Jamestown and Northern railroad in my custody, as such officer, and do not know that such map exists.

I do not know that a notation of said profile map was ever made on the plat of township 141 N., range 64 west, aforesaid; and upon consulting the plat book in my office, which is a book of original entry, I am unable to state that such notation has ever been made. I do not know whether such profile has ever been submitted to the Secretary of the Interior for his approval, and I have never made any notation upon such plat of the township aforesaid, nor am I able to state from an examination thereof that any such notation was ever made by any of my predecessors in office from any profile map of said railroad.

160 acres of land are included in the northeast quarter of land aforesaid. I do not know whether the final receiver's receipt or patent of said land, if any were ever issued, for the northeast quarter of section 8, 141, 64, contains a reservation of any kind for the Jamestown & Northern railroad, because I have never seen either
of said documents, and my tract book does not show any
27 reservation. Such notations have never been made within my experience on the plat book, so far as I now remember.

Cross-examination by Mr. BALL:

I call your attention to the plat of township 141 north, range 64 west, in the plat book, touching which you have been testifying, and ask you if it is not true that you find traced across such plat in red ink, marking a line extending from near the center of section 35, on the south line thereof, in a generally northwestern direction across sections 35, 34, 27, 22, 21, 16, 9, 8, 5, and 6 to the north line of said township, which line running upon said cource as indicated bears small cross-marks such as is generally used in map-making

to indicate a railroad, and which line also has connected with it in red ink the words "Jamestown Northern," with a red-ink arrow pointing north paral-ell with said line.

Answer. It is true.

Q. Do you not find in the same tract book, on other plats of townships both north and south of the one last referred to, a similar line with similar marking and which all put together show a continuous line of something apparrently indicating a railroad and which is called "Jamestown Northern"?

Answer. I do.

Q. Who, if any person besides the Government land officers, are authorized to make such markings or tracings upon Government plats in possession of a United States land office?

Answer. No one.

Q. What, if anything, is there upon any such plats to indicate the time of making such line?

Answer. Nothing.

Q. May it not be true, for aught you know to the contrary, that there was a properly made profile map of the Jamestown & Northern railroad on file in the United States land office in Fargo at the time such land office and its records were destroyed in June 7th, 1892?

Answer. It may.

28 Q. May it not also be true that the red ink which I have referred to, with cross-markings thereon, and which is labelled "Jamestown Northern," was made upon said plats by some one of your predecessors in office as his plat notations of such profile map?

Answer. It may.

Q. Is it not true that in the operation of the United States land office that all original documents, such as homestead entries and homestead and pre-emption proofs, are regularly forwarded by the local land office to the General Land Office, at Washington, and that such papers are there kept as original records, and that the local land officers only keep notation entries thereof in the local office books for their information and guidance?

Answer. That is true.

Q. Is it not also true that any person in interest can at any and at all times apply to said General Land Office and there obtain certified copies of any such original records for use in court or otherwise?

Answer. It is true.

A. E. SUNDERHAUFF.

Subscribed and sworn to before me at Fargo, N. D., this 20th day of July, A. D. 1897.

LEONARD A. ROSE,

[SEAL.] *Notary Public, Cass County, N. D.*

STATE OF NORTH DAKOTA, } ss:
County of Stutsman, }

In District Court, Fifth Judicial District.

JAMESTOWN & NORTHERN RAILROAD COMPANY, Plaintiff, }
vs.
THEODORE J. JONES, Defendant. }

29 STATE OF NORTH DAKOTA, } ss:
County of Cass, }

Be it known that I took the annexed deposition of A. E. Sunderhauff pursuant to the annexed stipulation; that I was then and there a notary public in and for said county and State; that I exercised the power of that office in taking such deposition; that by virtue thereof I was then and there authorized to administer an oath; that said witness, A. E. Sunderhauff, before testifying, was duly sworn to testify the whole truth and nothing but the truth relative to the cause specified in the annexed notice; that the testimony of said witness was correctly read over to him by me before he signed the same; that the examination was conducted on behalf of the plaintiff by Messrs. Ball, Watson & Maclay, of the city of Fargo, N. D.; that the examination was conducted on behalf of the defendant by Ormsby McHarg, Esq., of Jamestown, N. D. I further certify that I am not attorney for either of the above-named parties, and am not in anywise interested in said action.

Witness my hand and seal this 20th day of July, A. D. 1897.

LEONARD A. ROSE,
[SEAL.] *Notary Public, Cass County, N. D.*

Fees, $10.00.

(Endorsement:) Filed in clerk's office, Stutsman county, North Dakota, July 21, 1897, at 9 o'clock a. m. H. G. Proctor, clerk.

30 STATE OF NORTH DAKOTA, } ss:
County of Stutsman, }

In District Court, Fifth Judicial District.

JAMESTOWN & NORTHERN RAILROAD COMPANY, a Corporation, }
Plaintiff,
vs.
THEODORE J. JONES, Defendant. }

Order for Judgment.

This cause came regularly on for trial on the 23rd day of July, A. D. 1897, and was tried by the court without a jury, the plaintiff appearing by Messrs. Ball, Watson & Maclay, its attorneys, and the defendant appearing in person and by S. E. Ellsworth, his attorney. Evidence was introduced by both parties, and the court, having

heard the arguments of attorneys and being fully advised in the premises, now makes the following—

Findings of Fact.

I.

That at all times since the 17th day of September, A. D. 1881, the Jamestown & Northern Railroad Company was and now is a railroad corporation organized under and existing by virtue of the laws of the Territory of Dakota, now State of North Dakota.

II.

After its organization, as aforesaid, the said Jamestown & Northern Railroad Company authorized and directed the survye of a line of route for a railroad from a point near the city of Jamestown in a northwesterly direction through the county of Stutsman, in said Territory of Dakota, to the north line of said county. Said survey was commenced on the 1st day of September, A. D. 1881, and completed on the 30th day of October, 1881, and in its course passed diagonally across the northeast quarter of section 8, township 141, range 64, in said county. A map or plat representing said survey was prepared, and on the 5th day of October, A. D. 1882, said
31 company, by resolution of its board of directors, adopted the said line of route so surveyed and as represented on said map as the definite location of a section of its line of road between the points mentioned, said section being about thirty miles in length. During the summer of the year 1882 a grade was made by said company upon the line of said survey and a railroad constructed thereon, and ever since the summer of 1882, continuously until the present time, the plaintiff has operated its line of railroad over the land involved in this action.

III.

Thereafter said Jamestown & Northern Railroad Company transmitted to the Secretary of the Interior a copy of its articles of incorporation, certified by the secretary of Dakota Territory; also a certificate of its organization under the laws of the said Territory of Dakota, made by its secretary, and an affidavit of its president designating the officers of said corporation, all of which papers were received in the Department of the Interior on January 26th, 1883.

IV.

The land in controversy in this action is situated in the land district of the United States land office at Fargo and has been so situated at all times. On June 7th, 1893, the records of the United States land office at Fargo, North Dakota, were destroyed by fire. At the time of the trial of this case the records of said land office did not contain any profile or map of plaintiff's railroad over the land in question. Tract Book No. 15 of said land office is a copy

of the original tract book, which was destroyed by fire in June 7th, 1893, which said copy, now contained in the land office at Fargo, was furnished to said office by the General Land Office of the United States and was made up from the records there kept. Upon such Tract Book No. 15 and in the plat therein contained relating to township one hundred and forty-one (141), range sixty-four (64), there is traced across said plat in red-ink marking a line extending
32 from near the center of section 35, on the south line thereof, in a general northwest direction, across sections 35, 34, 27, 22, 21, 16, 9, 8, 5, and 6 to the north line of said township, which line running upon said course as indicated bears small cross-marks such as *is* generally used in map-making to indicate a railroad, and which line also has connected with it in red ink the words "Jamestown Northern," with a red-ink arrow pointing north parallel with said line. In the same Tract Book No. 15 the other plats of townships both north and south of the one last referred to are found similar lines with similar markings, and it all put together shows a continuous line of something apparently indicating a railroad and which is called "Jamestown Northern." In the operation of United States land offices all original documents, such as homestead entries and homestead and pre-emption proofs, are regularly forwarded by the local land office to the General Land Office at Washington, where the same are kept as original records.

Upon the trial plaintiff introduced in evidence a profile and map, showing the location of its line of railroad over the land in controversy in this action, and which profile and map contains the following indorsements and no others, namely:

"Part of map of definite location of Jamestown & Northern railroad from junction with Northern Pacific railroad to north line of Stutsman county, Dakota Territory. Brainerd, December 30th, 1882. P. H."

STATE OF MINNESOTA, } ss:
County of Crow Wing, }

A. Anderson, of Brainerd, in said county and State, being duly sworn, says that he is the engineer-in-chief of the Jamestown & Northern Railroad Company; that the survey of the line of route of said road from its junction with the Northern Pacific railroad at a point in the southwest quarter of section 26, township 140 north, of range 64 west, of the 5th principal meridian to the north line of Stutsman county, near the center of the north line of section 3, on the eleventh standard parallel, the dividing line between townships 144 and 145 north, of range 66 west, of the
33 same meridian, in the Territory of Dakota, a distance of thirty-two and eigth-tenths (32.8) miles, was made under his direction as engineer-in-chief of the company and under its authority, commencing on the 1st day of September, 1881, and ending on the 30th day of October, 1881, and that such survey is accurately represented on the accompanying map.

A. ANDERSON,
Engineer-in-chief.

Subscribed and sworn to before me this 28th day of December, 1882.

RICH RELF,
Notary Public.

I, Geo. H. Adams, do hereby certify that I am the president of the Jamestown & Northern Railroad Company; that A. Anderson, of Brainerd, who subscribed the foregoing affidavit, is the chief engineer of the company; that the survey of the line of route of the company's road, as accurately represented on the accompanying map, was made under authority of the company; that the said line of route was surveyed and, as represented on this map, was adopted by the company by resolution of its board of directors on the 5th day of October, 1882, as the definite location of the road from its junction with the Northern Pacific railroad on the north line of Stutsman county, in Dakota Territory, and that the map has been prepared to be filed for the approval of the Secretary of the Interior in order that the company may obtain the benefit of the act of Congress approved March 3rd, 1875, entitled "An act granting to railroads the right of way through public lands of the United States."

GEO. H. ADAMS,
President of the Jamestown & Northern Railroad Company.

Attest: SYDNEY STARBUCK, *Secretary.* [SEAL.]

34 Z. B. S. DEP'T OF INTERIOR, 13 *March*, 1883. J. K. McC.

Approved subject to any existing rights of the Northern Pacific Railroad Company.

H. M. TELLER, *Secretary.*

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *April* 29, 1897.

I, Binger Herman, Commissioner of the General Land Office, do hereby certify that the annexed tracing is a true and literal exemplification of a part of a map of definite location of the Jamestown and Northern railroad, approved by the Secretary of the Interior on March 13th, 1883, and now on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

BINGER HERMAN,
[SEAL.] *Commissioner of General Land Office.*

V.

Prior to February 12, 1881, the northeast quarter of section 8, township 141, range 64, in Stutsman county, Dakota Territory, was public land of the United States. Said tract was surveyed by the Government on January 5th, 1876, and the survey thereof recorded in the United States land office at Fargo on February 21st, 1876.

VI.

On the 12th day of February, A. D. 1881, one Sherman Jones filed in the United States land office at Fargo a declaratory statement under the pre-emption law, alleging settlement upon said tract on the 8th day of February, 1881. Said declaratory statement was received and entered in said land office and numbered 7465. On the 13th day of March, 1883, said entry had not been cancelled or vacated.

35

VII.

On the 26th day of May, A. D. 1882, one William S. King filed at said land office a declaratory statement under the pre-emption law upon said land. Said declaratory statement was received and entered at said land office, numbered 1252, and on the 13th day of March, 1883, had not been cancelled or vacated.

VIII.

On the 7th day of March, A. D. 1883, one Ella Sharp filed in said land office an application to be allowed to enter said tract under the homestead law, together with the affidavit required by law. Said application was received and entered at said land office and continued in force until, on the 21st day of November, 1892, it was cancelled at said land office by relinquishment.

IX.

On the 23rd day of February, A. D. 1883, the defendant, T. J. Jones, was a citizens of the United States and over the age of twenty-one years. On that day, intending to purchase said tract under the pre-emption laws, he built a house thereon; on the 3rd day of March of said year he commenced living in said house, and from that day continuously to the present has resided on said land and has cultivated and improved the same. On June 5th, 1883, he filed in said land office at Fargo a declaratory statement under the pre-emption law alleging settlement on said land on March 3rd, 1883. He afterward applied to said land office to be allowed to make proof under his declaratory statement, but owing to the existence of said prior homestead entry of Ella Sharp said application was refused. In November, 1892, he secured from said Ella Sharp a relinquishment of her homestead entry, and on the 21st day of November, 1892, the same date said entry was cancelled by relinquishment, he made application to said land office to be allowed to change his pre-emption entry upon said tract into a homestead entry. Said application was received at said land office, the entry allowed and numbered 20234, and a receiver's
36 receipt bearing the same number issued to said defendant. Afterward, on the 21st day of January, A. D. 1893, he made final proof for said land under the homestead law, and on February 18, 1893, a final receiver's receipt, numbered 7233, was issued to him by said land office at Fargo. On the 26th day of

May, 1893, a patent in due form, whereby the United States conveyed and granted said land to said defendant, was issued to and received by him. There was not in said receiver's receipt or final certificate or in said patent for said tract a reservation of any vested or accrued right, claim, or interest to said land on the part of the plaintiff or of any person or corporation under the act of Congress of March 3rd, 1875. At the time plaintiff settled upon said land plaintiff was and ever since has been engaged in operating a line of railroad thereover.

X.

The plaintiff has not at any time instituted proceedings or resorted to any process whatever under State or Federal laws to condemn a right of way across said land or to divest defendant of his title or any possessory right that he might have to said land.

XI.

Plaintiff has taken for its use as a right of way upon said land a strip one hundred feet wide, being fifty feet on each side of the central line of its railroad track and extending diagonally across said land from a point about the middle of its south boundary to a point near its northwest corner. Said strip includes about six acres of said land. The land not taken is divided into two unequal parts and its value for farming purposes decreased. Trains of cars are drawn by plaintiff over and across said land every day, and the crop on defendant's land is injured by smoke from said railroad and his buildings and crops subjected to increased hazard of destruction by fire. By the taking of said strip for a right of way and the construction and operation of a railroad thereon the said land is depreciated in value in the sum of three hundred
37 dollars.

XII.

Defendant has not at any time consented to the taking or use of said land by plaintiff, and has not received any compensation for said taking or for the injury and damage inflicted thereby.

Therefore the court from the above facts deduces the following

Conclusions of Law.

I.

The filing of the map of definite location of its road by plaintiff with the Secretary of the Interior and its approval by him on March 13th, 1883, was a condition precedent to acquisition of title to right of way, and said title, if acquired, dated from said filing and approval.

II.

On March 13, 1883, the land in question was by pre-emption and homestead entries made thereon prior to that date segregated from the public domain and was not part of the public lands of the United States.

III.

That defendant, T. J. Jones, is the owner in fee of said land, without reservation of any kind, and his title thereto relates back to February 23, 1883, the date of his settlement thereon.

IV.

The plaintiff has no vested or accrued interest, claim, right, or title to the strip now used by it for right of way upon said land or to its use.

V.

The plaintiff's application in this suit for a permanent restraining order should be denied, its suit dismissed, and the temporary restraining order heretofore granted dissolved.

VI.

Defendant, upon his counter-claim, is entitled to judgment against plaintiff for the sum of three hundred dollars and for his
38 costs.

VII.

Upon payment to the defendant of said sum of $300 and the costs of this action, there shall vest in the plaintiff and its successors and assigns the full legal title to that portion of the said northeast quarter of section 8, township 141, range 64, so by it appropriated, to wit, fifth feet on each side of the center line of said railroad, as the same has been heretofore constructed and is now located and operated through and over said premises.

Let the clerk enter judgment in accordance with the above findings.

Dated March 16th, 1898.

By the court:

S. L. GLASPELL, *Judge.*

Attest: H. G. PROCTER, *Clerk.* [SEAL.]

Filed in clerk's office, Stutsman county, North Dakota, March 17, 1898, at 11.15 o'clock a. m.

H. G. PROCTER, *Clerk.*

39 STATE OF NORTH DAKOTA, } ss:
County of Stutsman, }

In District Court, Fifth Judicial District.

JAMESTOWN & NORTHERN RAILROAD COMPANY, a Corporation, Plaintiff,
vs.
THEODORE J. JONES, Defendant.

Judgment.

This cause came regularly on for trial on the 23rd day of July, A. D. 1897, and was tried by the court without a jury, the plaintiff

appearing by Messrs. Ball, Watson & Maclay, its attorneys, and the defendant appearing in person and by S. E. Ellsworth, his attorney. Evidence was introduced by both parties, and the court having heard the arguments of counsel and being fully advised in the premises and having made and filed its findings of fact and conclusions of law herein:

Now, on the order of the court herein made and entered and on motion of S. E. Ellsworth, attorney for defendant, it is ordered and adjudged that plaintiff's cause of action be, and the same is hereby, dismissed, and that the temporary restraining order heretofore entered herein be, and the same is hereby, dissolved.

It is further ordered and adjudged that the defendant, Theodore J. Jones, have and recover of the plaintiff, Jamestown & Northern Railroad Company, the sum of three hundred dollars and his costs of this action, taxed at forty-four and $\frac{65}{100}$ dollars.

It is further ordered, adjudged, and decreed that upon the payment to the defendant of the sum of three hundred dollars and the costs of this action there shall vest in the plaintiff, Jamestown & Northern Railroad Company, and its successors and assigns, the full legal title to that portion of the northeast quarter of section 8, township 141, range 64, used by it as a right of way, to wit,
40 fifty feet on each side of the center line of said railroad, as the same has been heretofore constructed and is now located and operated through said land by said plaintiff.

Witness the Honorable S. L. Glaspell, judge of the fifth
[SEAL.] judicial district of the State of North Dakota, and the seal of said court this 17th day of March, 1898.

H. G. PROCTER,
Clerk of the District Court.

Filed in clerk's office, Stutsman county, North Dakota, March 17, 1898, at 11.15 o'clock a. m.

H. G. PROCTER, *Clerk.*

41 STATE OF NORTH DAKOTA, } ss:
County of Stutsman, }

In District Court, Fifth Judicial District.

JAMESTOWN & NORTHERN RAILROAD COMPANY, Plaintiff,
vs.
THEODORE J. JONES, Defendant.

Bill of Costs.

Attorney's fees:

Before notice of trial	$5.00
After notice and before trial	3.00
Trial issue of fact	5.00

Officer's fees:

Service subpœna on witness Taber	1.05

Notary's fees:

Taking deposition of witness Sunderhauff	10.00

Witness' fees:

Frank Keeler, 1 day'- att. and 12 miles' travel	2.20
Neal Campbell, 1 day'- att. and 13 miles	2.30
H. M. Taber, 1 day'- att. and 1 mile'- travel	1.10
Farnsworth, 1 day'- att. and 13 miles	2.30
Cost procuring certified copies of papers relating to homestead entries, T. J. Jones and E. Sharp	9.95
Cost certified copy of patent, Jones	75
Attending on taking of deposition, Sunderhauff	2.00
	$44.65

STATE OF NORTH DAKOTA, } ss:
County of Stutsman, }

S. E. Ellsworth, being first duly sworn, upon his oath deposes and says that he is attorney for T. J. Jones, the defendant in the
42 above-entitled action; that the items of the above bill of costs have been or will be necessarily incurred in said action.

S. E. ELLSWORTH.

Sworn to and subscribed before me this 14th day of February, 1898.

JAMES A. MURPHY,
[SEAL.] *Notary Public, Stutsman County, N. D.*

It is hereby stipulated and agreed that the costs in the above-entitled action may be entered by the clerk in the amount shown by the above statement.

BALL, WATSON & MACLAY,
Attorneys for Plaintiff.
S. E. ELLSWORTH,
Attorney for Defendant.

Costs in the above-entitled action are hereby allowed and taxed at $44.65 this March 17th, 1898.

H. G. PROCTER, *Clerk.*

Filed in clerk's office, Stutsman county, North Dakota, March 17th, 1898, at 11.15 o'clock a. m.

H. G. PROCTER, *Clerk.*

43 STATE OF NORTH DAKOTA, }
County of Stutsman. }

In District Court, Fifth Judicial District.

JAMESTOWN & NORTHERN RAILROAD COMPANY, Plaintiff and Appellant,
vs.
T. J. JONES, Defendant and Respondent.

Notice of Appeal to Supreme Court.

Please take notice that the plaintiff, The Jamestown & Northern Railroad Company, appeals to the supreme court of the State of North Dakota from the judgment entered in this action on March 17th, 1898. This appeal is taken from the whole of said judgment, save the portion thereof which directs that in case plaintiff shall pay the amount awarded by such judgment, with costs, the title to a strip of land 100 feet in width shall thereupon vest in plaintiff.

BALL, WATSON & MACLAY,
Attorneys for Jamestown & Northern Railroad Company, Plaintiff and Appellant.

To S. E. Ellsworth, attorney for defendant, and S. G. Proctor, clerk of the district court for Stutsman county.

Service of the foregoing notice of appeal and annexed undertaking on appeal, by copies thereof, delivered to and left with me, at Jamestown, N. Dak., this March 21st, 1898, is admitted.

S. E. ELLSWORTH,
Def't's Att'y.

Filed in clerk's office, Stutsman county, North Dakota, March 21, 1898, at 4.30 o'clock p. m.

H. G. PROCTER, *Clerk.*

44 STATE OF NORTH DAKOTA, }
County of Stutsman. }

In District Court, Fifth Judicial District.

JAMESTOWN & NORTHERN RAILROAD COMPANY, Plaintiff and Appellant,
vs.
T. J. JONES, Defendant and Respondent.

Whereas on the 17th day of March, 1898, in the district court within and for the county of Stutsman, the above-named respondent recovered a judgment against the above-named appellant for $300 damages, besides costs, for the dismissal of plaintiff's complaint and the dissolution of injunction heretofore issued herein and denying appellant's prayer for permanent injunction, and the above-named appellant, feeling aggrieved thereby, intends to appeal therefrom to the supreme court of the State of North Dakota: Now, therefore,

we do hereby undertake that the said appellant will pay all costs and damages which may be awarded against it on said appeal or on a dismissal thereof, not exceeding $250, and do also undertake that if the said judgment so appealed from, or any part thereof, be affirmed or said appeal dismissed, the said appellant will pay the amount directed to be paid by said judgment, or the part of such amount as to which the said judgment shall be affirmed, if it be affirmed only in part, and all damages and costs which shall be awarded against said appellant on said appeal.

JAMESTOWN & NORTHERN RAILROAD CO.,
By BALL, WATSON & MACLAY.
ALEX. STERN.
MAURICE KAUFMAN.

STATE OF NORTH DAKOTA, } ss:
County of Cass, }

On this 19th day of March, 1898, before me, a notary public in and for said county and State, personally appeared Alex.
45 Stern and Maurice Kauffman, known to me to be the persons who are described in and who executed the foregoing instrument, and acknowledged to me that they executed the same, and, each of said persons being duly sworn, each for himself doth depose and say that he is one of the sureties above named; that he is a resident and freeholder of the State of North Dakota, and worth the amount of $500 above his debts and liabilities, exclusive of his property exempt from execution, and consisting of property situated in the State of North Dakota.

JNO. S. WATSON,
[SEAL.] *Notary Public, Cass County, North Dakota.*

ALEX. STERN.
MAURICE KAUFMAN.

The foregoing bond is hereby approved.

H. G. PROCTER,
[SEAL.] *Clerk District Court.*

Filed in clerk's office, Stutsman county, North Dakota, Mar. 21, 1898, at 4.30 o'clock p. m.

H. G. PROCTER, *Clerk.*

46 STATE OF NORTH DAKOTA, } ss:
County of Stutsman, }

In District Court, Fifth Judicial District.

I, S. L. Glaspell, judge of the district court in and for the county of Stutsman and State of North Dakota, do hereby certify that the annexed and foregoing papers, to wit, summons, complaint, undertaking for injunction, injunctional order, affidavit of service, amended complaint, answer, reply, note of issue, notice of trial, deposition of A. E. Sunderhauf, order for judgment, judgment, bill of costs, notice

of appeal with proof of service thereof, and undertaking on appeal, are the original files constituting the judgment-roll in the action now pending in this court entitled Jamestown & Northern Railroad Company, plaintiff, *vs.* Theodore J. Jones, defendant.

S. L. GLASPELL, *Judge.*

STATE OF NORTH DAKOTA, } ss:
County of Stutsman, }

In District Court, Fifth Judicial District.

I, H. G. Procter, clerk of the district court in and for the county of Stutsman and State of North Dakota, do hereby certify that the above and foregoing is the original notice of appeal with the proof of service thereof and the original undertaking thereon, also the original judgment from which the appeal is taken, with all the pleadings used by each party, with the certificate of the judge thereto, in the action wherein Jamestown & Northern Railroad Company is plaintiff and Theodore J. Jones is defendant, and the same are transmitted to the supreme court pursuant to said appeal.

In witness whereof I have hereunto set my hand and affixed the seal of said court this 1st day of April, A. D. 1898.

H. G. PROCTER,
[SEAL.] *Clerk of the Dist. Court.*

Filed in the clerk's office, supreme court, State of North Dakota, Apr. 4, 1898.

R. D. HOSKINS, *Clerk.*

47 On the 12th day of May, 1898, at a regular term of the said supreme court of the State of North Dakota, duly convened pursuant to law, in the city of Bismarck, in said State, being the April, 1898, term of said court, the said cause was duly argued by Ball, Watson & Maclay for the said Jamestown & Northern Railroad Company, and by S. E. Ellsworth, Esq., for the said Theodore J. Jones, and the matter after said argument was taken under advisement by the court.

Thereafter and on the 4th day of June, 1898, there was filed the following order in the said cause:

STATE OF NORTH DAKOTA, ss:

In the Supreme Court.

JAMESTOWN & NORTHERN RAILROAD CO., Plaintiff and Appellant, }
vs.
THEODORE J. JONES, Defendant and Respondent. }

Appeal from the district court of Cass county.

This action coming on to be heard at the April, A. D. 1898, term of this court, at the supreme court room, in the city of Bismarck, State of North Dakota—present, Guy C. H. Corliss, chief justice;

J. M. Bartholomew and Alfred Wallin, associate justices—and the appeal herein having been argued by Ball, Watson & Maclay, for the appellant, and by S. E. Ellsworth, for respondent, and the court having advised thereon, it is now here considered, ordered, and adjudged that the judgment of the said district court within and for said Stutsman county, appealed from herein, be, and the same is hereby, affirmed.

And it is further ordered that this cause be, and it is hereby, remanded to the district court for further proceedings, according to law and the judgment of this court.

And it is further considered and adjudged that respondent have and recover of the appellant costs and disbursements on this appeal expended, to be taxed and allowed in the district court.

Dated June 4, 1898.

By the court:

GUY C. H. CORLISS,
Chief Justice.

Attest: R. D. HOSKINS, *Clerk.*
[SEAL.]

48 On the said 4th day of June, 1898, there was also filed the written opinion of the said court in the above-entitled action; which opinion is in words and figures as follows, to wit:

In the Supreme Court, State of North Dakota, April Term, 1898.

THE JAMESTOWN & NORTHERN RAILROAD COMPANY, Appellant,
vs.
THEODORE J. JONES, Respondent.

As against settlers, the grant of a right of way to a railroad company, under the act of Congress passed in 1875, attaches only after the profile of the road has been approved by the Secretary of the Interior, and not from the time the road itself is constructed.

One who settles upon land before such profile is approved, with intent to make a pre-emption filing thereon, secures such a possessory right therein as is required to be condemned by section 3 of the act, although at the time of his settlement the road has been constructed and is in full operation. The land is from the time of such settlement land disposed of within the implication of section 4, and hence the settler does not take subject to the right of way, which is, under the statute, superior to the title of the settler only as to land disposed of after the approval of the profile.

Held, further, that the failure of the settler to file his declaratory statement within the time prescribed by the statute will not affect his rights as against the railroad company's right of way.

Neither will his omission to make final proof within the statutory period destroy his superior rights when he is prevented by the fact that there is an uncancelled homestead entry against the land.

49 The rule that when public lands have been entered they are segregated from the public domain and that thereafter

a railroad grant cannot attach to them despite the fact that such entry is subsequently abandoned or set aside does not apply to the grant of a right of way under the act of Congress passed in 1875. As against the United States the grant attaches at the time of the approval of the profile, even though such land has been already filed upon, subject, however, to such prior entry. But if the same is thereafter cancelled or abandoned the grant of the right of way becomes absolute.

(Syllabus by the court.)

Appeal from the district court of Stutsman county, S. L. Glaspell, judge.

Ball, Watson & Maclay and James B. Kerr for appellant.

S. E. Ellsworth for respondent.

CORLISS, *C. J.:*

Plaintiff claims that it is entitled to a right of way over the defendant's land. It is conceded that it has never purchased or condemned such right of way. All the title it has must rest upon the act of Congress passed March 3rd, 1875, entitled "An act granting to railroads the right of way through the public lands of the United States." Section one of that act declares "that the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization under the same to the extent of one hundred feet on each side of the central line of said road; also the right to take from the public lands adjacent to the line of said road material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station buildings, depots, machine shops, side tracks, turnouts, and water stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road."

The plaintiff was organized as a railroad corporation on the 17th of September, 1881, under the laws of the then Territory of Dakota. After its organization it surveyed a line of route for its road from a point near the city of Jamestown in a northwesterly direction through the county of Stutsman to the northern boundary thereof. The line ran through the premises in question. The survey was finished October 30th, 1881. A map representing the survey was made, and thereafter the plaintiff, by resolution of its board of directors, adopted such survey as the definite route of its line of railroad. In 1882 the road was constructed, and since that time trains have been continuously run thereover by the plaintiff. On the 26th of January, 1883, the plaintiff filed with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization under the same. On the 13th of March, 1883, plaintiff's map of definite location was filed with and approved by the

Secretary of the Interior; but we find nothing in the case to show that it was ever filed in the office of the register of the land office as required by section four of the act. We will assume, however, that it was in fact filed there and was thereafter forwarded to the Secretary of the Interior, it being undisputed that since March 13th, 1883, it has been on file in his office.

Defendant claims title to the land under a settlement made by him as a pre-emptor on the 23rd day of February, 1883, more than two weeks before the map of definite location was approved by the Secretary of the Interior. It is undisputed that he is the fee owner of the quarter section of land across which plaintiff claims a right of way, he having received a patent therefor. The only contention on the part of the plaintiff is that his right as owner is subject to the plaintiff's rights under the act of 1875. Plaintiff does
51 not claim that it is the fee owner of the strip of land involved, but only that it has an eas-ment therein under the act of Congress. Not having condemned or purchased such eas-ment, it must, of course, show that it has obtained the same under that act.

Defendant at the outset lays down the broad proposition that when the grant became operative as to the plaintiff the land in question was no longer public land, because of the fact that there *was* then outstanding two pre-emption and one homestead filing against it. And in this connection he cites a number of decisions in support of the well-established doctrine that in cases of land grants (not, however, for a right of way) the character of the land as public land is fixed by its condition at the moment the grant attaches, and that therefore, if any portion of the grant has been previously segregated from the public domain by entry, it does not fall within the terms of the grant, even though such entry be thereafter abandoned or set aside. Hastings, etc., R. R. Co. *vs.* Whitney, 132 U. S., 357; Kans. Pac. R. R. Co. *vs.* Dunmeyer, 113 U. S., 629; Bardon *vs.* Northern Pacific Railroad Co., 145 U. S., 806; Northern Pacific R. R. Co. *vs.* Colburn, 164 U. S., 383; Whitney *vs.* Taylor, 158 U. S., 85. We do not think that these decisions apply to the act under which plaintiff claims.

When the act of 1875 is construed as a whole *he* believe that as against the United States the right of way is transferred even when the land has been entered at the time the map is approved, and that if such entry is subsequently abandoned or set aside the grantee will enjoy an absolute eas-ment in the land. The rights of the railroad company will be subject to all rights which have attached to the land before the filing and approval of the map of definite location. But as against the United States the grant is as effective in cases where the land has been entered as where it has not. Under any other view of the statute the railroad company might be compelled to condemn successive rights of settlers only to find that all its proceedings were futile be-
cause in each case the settler's rights were, by can-
52 cellation or abandonment, destroyed. We think that it was the purpose of Congress to make the grant operative as

against the Government subject only to existing rights of settlers, and that the question whether a particular piece of land was within the terms of the grant so far as the Government was concerned was not to depend upon the freedom of that land from settlement at the time the map was approved. Under this view of the statute a railroad company could never be required to condemn any other than existing rights. When these should once be condemned the destruction or abandonment thereof, followed by a new entry, would not force the grantee to assume anew the burden of condemning subsequent rights and meeting with a similar experience, to take up again, perhaps, the Sisyphean task of toiling hopelessly for title, only to find each time that all its efforts had proved abortive. Nor are we without express authority on this point. Hamilton *vs.* Spokane, etc., R'y Co., 28 Pac. Rep., 408. The decision of the court in that case accurately stated in the syllabus is as follows: "One Wilkins filed declaratory statement November 7, 1888, and relinquished the same October 5, 1889, on which day Daniel made homestead entry of the same tract, and on April 29, 1890, made cash entry of said tract, and on September 3, 1890, conveyed by warranty deed to Hamilton a portion of said tract. The railroad company claims right of way over tract conveyed to Hamilton, by reason of compliance with act of Congress of March 3, 1875, and the approval of the plat by the Secretary of the Interior July 11, 1889. Hamilton claims damages because of company grading its road-bed through said conveyed tract. Held, that Wilkins' pre-emption filing did not exempt said land from the grant of right of way to the company, as he relinquished the same before perfecting the title; that there was no privity of estate between said Wilkins and Daniel; that patent to Daniel would take effect, by relation, October 5, 1889, the date of Daniel's homestead entry, and would not antedate the grant to the company." And in Alexander *vs.* Railroad, 40 S. W. Rep., 53 104, the same doctrine was announced and applied.

But it appears that the settlement of the defendant was made before the map of definite location was filed and approved, and defendant's counsel contends that for this reason his rights are superior to those of the plaintiff. He contends that as against third persons the decisive moment is the time of the approval of the map. On this point he is supported by authority. Tilicuthal *vs.* Southern Cal. R'y Co., 56 Fed. Rep., 701; Larsen *vs.* Oregon, etc., R'y Co., 19 Ore., 240; Hamilton *vs.* Spokane, etc., R'y Co., 28 Pac. Rep., 408; Enoch *vs.* Spokane, etc., R'y Co., 6 Wash. St., 393; Chicago, etc., R'y Co. *vs.* Van Cleve, 33 Pac. Rep., 472; Reidt *vs.* Spokane, etc., R'y Co., 34 Pac. Rep., 150. The clear implication of section four is that settlers shall take subject to the right of way only when their rights attach after the approval of the map, or, as the statute speaks of it, the "profile of its road." That section provides "that any railroad company desiring to secure the benefits of this act shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and if upon unsurveyed lands within twelve months after the survey thereof by the United States, file with the register of the land office

for the district where such land is located a profile of its road, and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way." Counsel for the plaintiff contends that in view of the fact that the road had been constructed and was in operation at the time the defendant settled on the land the grant of the right of way attached before the interest of defendant under such settlement; and in this connection they cite the decision of Secretary Vilas in the Downey case, 8 Land Dec., 115. The reasoning of the Secretary seems to be destitute of force. Section four was not framed for special cases, as he seems to think, but
54 was intended to apply to every case arising under the law. The implication that only after the approval of the profile of the road should land be disposed of subject to the right of way applies to every conc*ie*vable case which can arise under the act, as well those where the road has been constructed as those where it has not.

We believe that lands are disposed of, within the meaning of this section, whenever a pre-emption settlement thereon has been made. It is clear from section three that the act contemplates that a settler who has only possessory rights shall be protected as much as one who has made final proof. It declares "that the legislature of the proper Territory may provide for the manner in which private lands and possessory claims on the public lands of the United States may be condemned." The land in question was unoffered land, and the statute recognizes the fact that a settler thereon acquires rights by his mere settlement, though no entry thereof has yet been made. Section 2265, R. S. of U. S., 1878. Sections three and four treat such settler who has made his settlement prior to the approval of the profile of the road (which is nothing more than a map of definite location) as possessing superior rights which must be considered by the railroad company the same as any other private property. It is obvious that lands are disposed of, within the meaning of section four, whenever a person has secured thereon such a possessory right as the railroad company is required to condemn under section three. It has been held by the highest authority that settlement without entry confers upon the settler such a possessory right. Washington, etc., R. R. Co. *vs.* Osborn, 169 U. S., 103; Spokane, etc., R'y Co. *vs.* Zeigler, 167 U. S., 65. Of course, the right so initiated must be followed up by the steps necessary to the acquisition of title.

It is insisted by counsel for plaintiff that the rights so obtained by the defendant were lost by his failure to make his entry within three months after his settlement; but section 2265, R. S. U. S., does not declare an absolute forfeiture, but only one in favor of
55 another settler. It is clear from the language of the statute and from the decisions of the Federal Supreme Court that a railroad company claiming a right of way under the act of 1875 is not within the class of persons who may take advantage of the failure of the settler to proceed with diligence in the filing of his

declaratory statement. Johnson *vs.* Towsley, 13 Wall., 72. Even the Government itself cannot insist upon the forfeiture. The settler places himself in the power of a certain class of persons by his default. In all other respects his position is unassailable as one who has strictly complied with law.

Nor is there anything in the contention of counsel for plaintiff that defendant has lost his priority by his failure to make final proof within thirty months after filing his declaratory statement, though he is required so to do by section 2267, R. S. U. S. He offered in time to make final proof, but his offer was rejected owing to the fact that there was an uncancelled homestead entry against the land. While he was powerless to make final proof he was not in default. Shepley *vs.* Cowan, 91 U. S., 338; Weeks *vs.* Bridgman, 159 U. S., 540. On the 21st of November, 1892, he procures a relinquishment of the homestead entry and changed his pre-emption to a homestead entry, and on July 21st, 1893, he made final proof under his homestead entry, and thereafter he received his patent. These facts make it apparent that the disposition of the land to the defendant, which antedated the approval by the Secretary of the Interior of plaintiff's profile of its road, has never been annulled, but that, on the contrary, the initial step has, so far as the plaintiff is concerned, been followed by all the necessary steps to trabsmute the original possessory right into a perfect legal title, which relates back to the settlement on February 23rd, 1883, as against the plaintiff's claim to a right of way over the land.

It is therefore our opinion that the plaintiff has no right of way over the defendant's land, and as this was the decision of the lower court, that decision is in all respects affirmed.

All concur.

GUY C. H. CORLISS.
ALFRED WALLIN.
J. M. BARTHOLOMEW.

56 Thereafter and on the 10th day of June there was filed a petition for a rehearing; which petition is in words and figures as follows, to wit:

In Supreme Court, State of North Dakota, April Term, 1898.

JAMESTOWN & NORTHERN RAILROAD COMPANY, Plaintiff and Appellant,
vs.
THEODORE J. JONES, Defendant and Respondent.

The Jamestown and Northern Railroad Company, plaintiff and appellant in the above-entitled action, respectfully petitions the court to order a re-argument in the above-entitled action.

We base this petition upon the proposition that this court erred in holding that the actual location and construction of the line of railroad over the land in question, prior to settlement of defendant thereon, did not operate to convey a right of way thereover under

the provisions of section one of the act of 1875, and in holding that such right of way could only vest upon performance of the conditions set out in section 4 of said act.

In support of the proposition that the construction of the road alone was sufficient to vest in the company a right of way, we cite the following cases:

Washington & Idaho Co. *vs.* Cœur d'Alene R'y, 160 U. S., 77; N. P. Railroad Company *vs.* Patrick H. Smith, decided by Supreme Court of the U. S. May 31st, 1898, not yet reported.

Respectfully submitted.

BALL, WATSON & MACLAY,
Attorneys for Plaintiff and Appellant.

57 Thereafter and on the 9th day of July, 1898, an order of court was entered denying said petition for rehearing; which order is as follows:

File No. 575.

STATE OF NORTH DAKOTA, *ss:*

In the Supreme Court.

JAMESTOWN AND NORTHERN RAILROAD CO., Plaintiff and Appellant,
vs.
THEODORE J. JONES, Defendant and Respondent.

Appeal from the district court of Stutsman county.

This action coming on to be heard at the April, A. D. 1898, term of this court at the supreme court room, in the city of Bismarck, State of North Dakota—present, Guy C. H. Corliss, chief justice; J. M. Bartholomew and Alfred Wallin, associate justices—and a petition for a rehearing upon the appeal herein having been filed by Ball, Watson & Maclay for the appellant, and the court having advised thereon, it is now here considered, ordered, and adjudged that the petition be, and the same is hereby, denied.

And it is further ordered that this cause be, and it is hereby, remanded to the district court for further proceedings according to law and the judgment of this court.

Dated July 9, 1898.

By the court:

GUY C. H. CORLISS,
Chief Justice.

Attest:
[SEAL.] R. D. HOSKINS, *Clerk.*

58 Also on said 9th day of July, 1898, the following opinion of court was filed:

In the Supreme Court, State of North Dakota, April Term, 1898.

THE JAMESTOWN & NORTHERN RAILROAD COMPANY, Appellant,
vs.
THEODORE J. JONES, Respondent.

On application for a rehearing.

CORLISS, *C. J.:*

Counsel for appellant urges with great earnestness that inasmuch as its road had been constructed over the land in controversy before the defendant had initiated his pre-emption rights by settlement, such rights are subject to plaintiff's title to the right of way in question. There is much equity in this contention, and were it not for the language of the statute, we would be strongly inclined to sustain it; but the implication found in section four that the settler takes, subject to the right of way only when his rights attach, after the map of definite location has been filed and approved, when considered in the light of the provisions of section three, which clearly show that mere possessory rights must be condemned by the railroad company, plainly point to only one conclusion, in our judgment—*i. e.*, that when a settler has taken possession of land with a view to making a pre-emption filing thereon before the map of definite location of a railroad right of way thereover has been filed and approved, the railroad company must condemn the possessory right of the pre-emptor. The cases cited by counsel for defendant on this application are, in our opinion, easily distinguishable from the case before us for decision. In Washington, etc., R. R. Co. *vs.* Cœur D'Alene R'y & Nav. Co., 160 U. S., 77, the plaintiff was seeking to recover possession in ejectment of a right of way which it
59 claimed that it had acquired under the provisions of the act of 1875, the act which we are here construing. It is obvious that under a familiar rule the plaintiff in order to recover was obliged to establish its title to the right of way, as its right to possession depended entirely upon its title. It based its claims upon the fact that it had surveyed and staked the particular portion of the right of way in controversy the day before the defendant had surveyed and staked a right of way over the same land, but the court held that such previous survey gave the plaintiff no rights whatever, for the reason that at the time it was made the line of plaintiff's railroad as described in its articles of incorporation did not cover or include the land in controversy or any part thereof. Besides, it appeared that the plaintiff had not at that time placed itself in the category of those entitled to the benefit of the act of 1875, as it had not yet filed with the Secretary of the Interior a certified copy of its articles of incorporation and proof of its organization thereunder.

It was contended on behalf of the plaintiff that on subsequently amending its articles of incorporation to include a line of railroad over the land in dispute and thereafter filing its articles of incorporation and proof of organization it had a right to adopt a pre-

vious survey, and that such adoption related back to the date when it was made; but the court refused to take this view of the question, holding "that, so far as the conflicting rights of the parties to this controversy are concerned, the status of the plaintiff is the same as if its survey of Oct. 28, 1886, had not been made." This brief review of this case lays bare the fact that the plaintiff therein was defeated in its action of ejectment because the act of survey on which it rested its right to possession was adjudged to be utterly without legal effect for the reason stated in the opinion, reasons which have no bearing on the case at bar.

We have carefully studied the recent decision of the Federal Supreme Court in Northern Pacific Railroad Co. *vs.* Smith
60 (opinion filed May 31st, 1898), to which our attention has been called by counsel for the appellant. That case is, in our judgment, so plainly distinguishable from the controversy before us that we deem it unnecessary to do more than state our conclusion that it is not an authority for the appellant; nor do we discover in the opinion any reasoning which, when fairly construed, militates in the least against our decision in this cause. The point on which our holding is adverse to the appellant is by no means so clear that we feel the very highest degree of confidence that we are right in our view, and it is therefore a great satisfaction to us to realize that our error, if any, can and probably will be corrected by a higher tribunal.

The application for a rehearing is denied.

All concur.

GUY C. H. CORLISS.
ALFRED WALLIN.
J. M. BARTHOLOMEW.

61 Whereupon and on the 9th day of July a final judgment was entered; which final judgment is in words and figures as follows:

File No. 575.

STATE OF NORTH DAKOTA, *ss:*

In the Supreme Court.

JAMESTOWN & NORTHERN RAILROAD COMPANY, Plaintiff and Appellant,
vs.
THEODORE J. JONES, Defendant and Respondent.

Appeal from the district court of Stutsman county.

This action coming on to be heard at the April, A. D. 1898, term of this court, at the supreme court rooms, in the city of Bismarck, State of North Dakota—present, Guy C. H. Corliss, chief justice; J. M. Bartholomew and Alfred Wallin, associate justices—and the appeal herein having been argued by Ball, Watson & Maclay, for the appellant, and by S. E. Ellsworth, for the respondent, and the

court having advised thereon and having decided that the judgment herein should be affirmed, and the appellant having applied for a rehearing herein and his application having been denied, and he having exhausted every remedy in the State courts, and nothing remaining to be done herein but the purely ministerial act of entering judgment of affirmance in the district court, it is now here—

Considered, ordered, and adjudged that the judgment of the district court within and for Stutsman county, appealed from herein, be, and the same is hereby, in all things affirmed.

And it is further ordered that this cause be, and it is hereby, remanded to the district court for further proceedings according to law and the judgment of this court.

And it is further considered and adjudged that respondent have and recover of the appellant costs and disbursements on this appeal expended, to be taxed and allowed, in the district court.

Dated July 9th, 1898.

By the court:

GUY C. H. CORLISS,
Chief Justice.

[SEAL.] Attest: R. D. HOSKINS, *Clerk.*

62 Thereafter and on the 3rd day of August, 1898, a petition for a writ of error was filed; which said petition is in words and figures as follows, to wit:

In Supreme Court, State of North Dakota.

JAMESTOWN & NORTHERN RAILROAD COMPANY, Plaintiff and Appellant,
vs.
THEODORE J. JONES, Defendant and Respondent.
} At Law.

Petition for Writ of Error.

And now comes the plaintiff and appellant herein, The Jamestown and Northern Railroad Company, and says that on the 9th day of July, 1898, this court entered judgment herein in favor of the defendant and against the plaintiff, The Jamestown & Northern Railroad Company aforesaid, in which judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of this plaintiff; all of which will more in detail appear from the assignments of error which is filed with this petition.

Wherefore that plaintiff prays that a writ of error may issue in this behalf to the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to said Supreme Court of the United States, and that a

supersedeas be allowed upon lodging with the clerk of this court its bond according to law therefor.

Dated at Fargo, North Dakota, July 15th, 1898.

C. W. BUNN,
JNO. S. WATSON, AND
BALL, WATSON & MACLAY,
Attorneys for Plaintiff and Appellant.

63 In connection with said petition for a writ of error, and on said 3rd day of August, there was filed the following assignments of error:

In Supreme Court, State of North Dakota.

JAMESTOWN & NORTHERN RAILROAD COMPANY, Plaintiff and Appellant,
vs.
THEODORE J. JONES, Defendant and Respondent.

Assignments of Error.

The plaintiff in this action, The Jamestown & Northern Railroad Company, in connection with its petition for a writ of error, makes the following assignments of error, which it avers occurred upon the trial and determination of the cause in this the supreme court of the State of North Dakota, to wit:

I.

The court erred in denying plaintiff's assignments of error committed by the district court for Stutsman county, North Dakota, upon the trial of said case in said district court in the making and finding of the first conclusion of law, and wherein this court erroneously ruled and adjudged that the district court did not err in the making of such conclusion of law, which was, to wit: "The filing of a map of definite location of its road by plaintiff with the Secretary of the Interior and its approval by him on March 13th, 1883, was a condition precedent to acquisition of title to right of way, and said title, if acquired, dated from said filing and approval."

II.

The court erred in denying plaintiff's assignment of error committed by the district court for Stutsman county, North Dakota, upon the trial of said cause in said district court in the making and
64 finding of the second conclusion of law, and wherein this court erroneously ruled and adjudged that the district court did not err in the making of such conclusion of law, to wit: "On March 13th, 1883, the land in question was, by pre-emption and homestead entries made thereon prior to that date, segregated from the public domain and was not part of the public lands of the United States."

III.

The court erred in denying plaintiff's assignment of error committed by the district court for Stutsman county, North Dakota, upon the trial of said case in said district court, in the making and finding of the third conclusion of law, and wherein this court erroneously ruled and adjudged that the district court did not err in the making of said conclusion of law, which was, to wit: "The defendant, T. J. Jones, is the owner in fee of said land without reservation of any kind, and his title thereto relates back to February 23, 1883, the date of his settlement thereon."

IV.

The court erred in denying plaintiff's assignment of error committed by the district court for Stutsman county upon the trial of said case in said district court in the making and finding of the fourth conclusion of law, and wherein this court erroneously ruled and adjudged that the district court did not err in the making of such conclusion of law, which was, to wit: "The plaintiff has no vested or accrued interest, claim, right, or title to the strip now used by it for right of way upon said land or to its use."

V.

The court erred in denying plaintiff's assignment of error committed by the district court for Stutsman county upon the trial of said cause in said district court in the making and finding of the fifth conclusion of law, and wherein this court erroneously ruled and adjudged that the district court did not err in making of such conclusion of law, which was, to wit: "The plaintiff's application in this suit for a permanent restraining order should be denied, its suit dismissed, and the temporary restraining order heretofore granted dissolved."

VI.

The court erred in denying plaintiff's assignment of error committed by the district court for Stutsman county, North Dakota, upon the trial of said cause in said district court in the making and finding of the *is*xth conclusion of law, and wherein this court erroneously ruled and adjudged that the district court did not err in the making of such conclusion of law, which was, to wit: "Defendant, upon his counter-claim, is entitled to judgment against plaintiff for the sum of $300 and for his costs."

VI.

The supreme court of North Dakota manifestly erred in denying to plaintiff the right and privilege which it claimed under the laws of the United States, to wit, the right to acquire title to right of way over the land in controversy by the actual construction and operation of its line of railroad thereover.

VII.

The supreme court of North Dakota manifestly erred in holding that it was necessary for plaintiff to file a map of definite location of its line of railroad in order to give it priority over the claim of defendant; which claim arose subsequently to the actual construction of the railroad and the putting of the same in operation.

VIII.

Upon the record herein the supreme court of North Dakota manifestly erred in holding that the plaintiff has no right or title to the strip of land in controversy used by it for right of way upon said land.

IX.

The supreme court of the State of North Dakota manifestly erred in denying to plaintiff, by the judgment against it, the right and title to a right of way over the land in controversy; which right and title it claimed under and by virtue of the provisions of
66 that certain act of Congress entitled "An act granting to railroads the right of way through the public lands of the United States," approved March 3rd, 1875.

X.

Upon the record, the supreme court of North Dakota manifestly erred in confirming the judgment of the district court of Stutsman county, which adjudged the plaintiff's complaint be dismissed, the temporary restraining order dissolved, and that defendant recover of plaintiff $345.55.

XI.

The supreme court of North Dakota manifestly erred in denying plaintiff's petition for a rehearing on the ground that said court had overlooked and disregarded the record and the law applicable thereto in relation to the paramount title to the strip of land in question, acquired by plaintiff by virtue of actual construction and operation of its line of railroad thereover prior to defendant's settlement on said land.

Wherefore the said Jamestown & Northern Railroad Company prays that the judgment of the said supreme court of the State of North Dakota and the judgment of the district court for Stutsman county, North Dakota, be reversed and said court be ordered to enter judgment that plaintiff is the owner of the right of way across the land in controversy, to the extent of one hundred feet on each side of its center line of said road as now constructed over and upon the same, and that any right, title, or interest which the defendant may have in said quarter section of land be adjudged subject and inferior to the plaintiff's said right of way; also that the tempo-

rary restraining order granted by the said district court for Stutsman county be made perpetual.

C. W. BUNN,
JNO. S. WATSON, AND
BALL, WATSON & MACLAY,
Attorneys for Jamestown & Northern Railroad Company, Appellant.

67 There was also and on the 3rd day of August filed an undertaking on the writ of error; which undertaking is in words and figures as follows, to wit:

In Supreme Court, State of North Dakota.

JAMESTOWN & NORTHERN RAILROAD COMPANY, Plaintiff and Appellant,
vs.
THEODORE J. JONES, Defendant and Respondent.

Know all men by these presents that we, Jamestown & Northern Railroad Company, a corporation existing under the laws of the State of No. Dakota, as principal, and Max Stern and Maurice Kaufman, as sureties, are held and firmly bound unto Theodore J. Jones in the full and just sum of $750.00, to be paid to the said Theodore J. Jones, his attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our successors, heirs, administrators, and executors, jointly and severally by these presents.

Sealed with our seals and dated this July 29th, A. D. 1898.

Whereas lately, at a session of the supreme court of the State of North Dakota, in a suit depending in said court between The Jamestown and Northern Railroad Company, as plaintiff, and said Theodore J. Jones, as defendant, a final judgment was, on the 9th day of July, 1898, rendered in favor of said Theodore J. Jones and against the said Jamestown & Northern Railroad Company for the sum of $345.55, and which judgment of the supreme court in all things affirmed the judgment of the district court for Stutsman county, in the State of North Dakota, in said action, entered and rendered in said last-named court on March 17th, 1898, in favor of the said Theodore J. Jones and against the said Jamestown & Northern Railroad Company, for the said sum of $345.55, and the said

68 Jamestown & Northern Railroad Company having obtained a writ of error and filed a copy thereof in the office of the clerk of this court to reverse said judgment in the aforesaid suit, and a citation directed to the said Theodore J. Jones, citing and admonishing him to be and appear at the Supreme Court of the United States, to be holden in Washington, the second Monday of October next:

Now, the condition of the above obligation is such that if the Jamestown & Northern Railroad Company shall prosecute said writ of error to effect and answer all damages and costs if said

Jamestown & Northern Railroad Company fail to make good its plea, then the above obligation to be void; else to remain in full force and effect.

In witness whereof the said Jamestown & Northern Railroad Company has caused these presents to be duly executed, and the said Max Stern and Maurice Kaufman have duly affixed their names and seals hereto the day and year first above written.

JAMESTOWN & NORTHERN
RAILROAD COMPANY,
By BALL, WATSON & MACLAY,
Its Attorneys of Record.

MAX STERN.
MAURICE KAUFMAN.

In the presence of—
JNO. S. WATSON.

STATE OF NORTH DAKOTA, } ss:
County of Cass, }

Max Stern and Maurice Kaufman, being severally and duly sworn, each for himself says that he is one of the parties who executed the foregoing bond; that he is worth the full sum of $750.00 over and above all his debts and liabilities and exclusive of all property by law exempt from levy and sale under execution.

MAX STERN.
MAURICE KAUFMAN.

69 Subscribed and sworn to before me this 29th day of July, 1898.

JNO. S. WATSON,
[SEAL.] *Notary Public, Cass County, North Dakota.*

The within and foregoing bond and the sureties thereon are hereby approved, and the said bond is accepted as a supersedeas undertaking.

Dated July 30th, 1898.

GUY C. H. CORLISS,
Chief Justice of the Supreme Court of the State of North Dakota.

Endorsed on cover: Case No. 17,005. North Dakota supreme court. Term No., 142. The Jamestown and Northern Railroad Company, plaintiff in error, *vs.* Theodore J. Jones. Filed September 28th, 1898.